Supreme Court, U.S.
FILED
061090 FEB 23 2007
OFFICE OF THE CLERK

No. 06-

IN THE

Supreme Court of the United States

JOSEPH KOFOED,

Petitioner,

v.

STEVEN SHIPRACK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JOSEPH W. KOFOED
Petitioner, Pro se
6005 N. Minnesota Avenue
Portland, Oregon 97217
(503) 735-9029

206402

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Petitioner as per Oregon constitution rights, filed a state defamation claim against a union representative who in turn claimed complete preemption based on an affirmative defense, and qualified privilege is an affirmative defense.

Why would the court need to interpret the CBA to evaluate the existence of a privilege when the complete preemption doctrine does not abrogate the standard rule that a defense of preemption does not create a federal jurisdiction?

Does overlooked controlling case law set new controlling case law precedent?

IN THE

SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

The unpublished Memorandum Order of the United States Court appears at Appendix A. The District Court Opinion and Order appears at Appendix B. The State of Oregon Complaint appears at Appendix D.

STATEMENT OF JURISDICTION

The date the United States Court of Appeals decided petitioner's case was August 29, 2006. The date of Petition for Rehearing order denial was November 13, 2006 (App. C), The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Oregon Constitution, Bill of Rights, Article 1, Section 10 provides:

> "No court shall be secret, but justice shall be administered, openly without purchase, completely without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation."

STATEMENT OF THE CASE

For nonredundancy reasons, please refer to Appendix D which is the original Oregon complaint based upon right to do so under the Oregon Constitution Rill of Rights.

Beyond Petitioner's Oregon complaint in 2004, an attorney proceeded until the final order of the United States District Court. The appeal to the United States Court of Appeals, Ninth Circuit, was proceeded with the University of Washington School of Law as part of the Ninth Circuit Pro Bono Program. This era terminated when the petition for rehearing Order was filed.

Defamation is clearly not a negotiable collective bargaining agreement item. Petitioner filed his Oregon complaint in the parameters of an independent violator of defamation amidst outside the scope of CBA involvement.

REASONS FOR GRANTING THE PETITION

Controlling case law is overlooked. In *Balcorta v. Twentieth Century-Fox Film Corp.*, 1102 (9th Cir. 2000), the Court clearly stated that "the 'complete preemption' doctrine does not abrogate the standard rule that a defense of preemption does not create federal question jurisdiction." *Id.* at 1107 n.7 (emphasis added).

Cramer v. Consolidated Freightways, Inc., 255 F.3d 683 (9th Cir. 2001) was solely based on protections afforded them under state law. The Court therefore concluded that the defendant could not invoke federal jurisdiction merely by pointing to terms of a collective bargaining agreement that arguably provided a defense to the plaintiff's claims. *Id.* at 694.

"Must be read as it is written", in addition to the U.S. Supreme Court being incumbent to read with full credit to its language was fully anchored in *United States v. Price, et al.*, 383 U.S. 787 as should all courts.

The Ninth Circuit case law regarding complete preemption were either overlooked or misapprehended with full credit to the language of Balcorta and Cramer. The reason for granting the petition is that controlling case law must be read a it is written.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH W. KOFOED
Petitioner, Pro se
6005 N. Minnesota Avenue
Portland, Oregon 97217
(503) 735-9029

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED AUGUST 29, 2006

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04-36121

D.C. No. CV-04-00558-ALA

JOSEPH KOFOED,

Plaintiff-Appellant,

v.

STEVEN SHIPRACK,

Defendant-Appellee.

Appeal from the United States District Court
for the District of Oregon
Ann L. Aiken, District Judge, Presiding

Argued and Submitted June 5, 2006
Seattle, Washington

Before: FERGUSON and CALLAHAN, Circuit Judges, and BOLTON,* District Judge.

---

* The Honorable Susan R. Bolton, United States District Judge for the District of Arizona, sitting by designation.

Appendix A

III.

Kofoed's second argument is that even if the CBA must be consulted, it need not be construed to resolve his suit, and therefore § 301 preemption does not apply. As the Supreme Court held in *Livadas v. Bradshaw*, when "the meaning of contract terms is not subject to dispute, the bare fact that a collective bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished." 512 U.S. 107, 123-26, 114 S.Ct. 2068, 129 L.Ed.2d 93 (1994). By contrast, "when resolution of a state-law claim is substantially dependent upon analysis of the terms" of a CBA, § 301's demand for uniformity requires that the suit be preempted. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985).

Here, in comparing the standard under Oregon law for determining privilege with the relevant provisions of the CBA, it is clear the trial court will have to interpret the terms of the CBA in order to resolve Kofoed's claim. Specifically, under Oregon law, a qualified privilege exists when a statement "is made to protect the interests of defendants," "is made to protect the interests of plaintiff's employer," or "is on a subject of mutual concern to defendants and the persons to whom the statement was made." *Wattenburg v. United Med. Labs.*, 269 Or. 377, 525 P.2d 113, 113 (1974); *see Walsh v. Consol. Freightways*, 278 Or. 347, 563 P.2d 1205, 1210 (1977). As such, to resolve Kofoed's claim, a court will have to determine what Siemens's "interests" are, what the subjects of "mutual concern" between Local 48 and Siemens are, and-possibly-what Local 48's "interests" are.

Turning to the CBA, the first three sections of article V, which broadly establish Local 48's exclusive right to refer workers to Siemens, raise several questions that must be answered before the scope of Shiprack's privilege can be determined. These questions include whether the union, as the sole and exclusive source of referrals to the employer, enjoys an implicit right not to refer a worker; whether the CBA confers upon the union the implicit authority to refer based on subjects "of mutual concern" to the signing parties; and whether the union's right to refer should be read in conjunction with the basic principles of the CBA. Given the particular terms of this CBA, which are not plain, the trial court will have to engage in significant contract interpretation before it can answer these questions that Oregon law has identified as key to determining the scope of Shiprack's privilege to communicate with Siemens. *See Allis-Chalmers,* 471 U.S. at 215-16, 105 S.Ct. 1904 (holding that determining whether a CBA contains implied rights is an interpretative act that triggers § 301 preemption, and one that "must be left to federal law"). Since the question of whether Shiprack's remarks were privileged cannot be answered by a plain reading of the CBA, and because the need to interpret the CBA is neither "limited" nor "speculative," *see Humble,* 305 F.3d at 1011, we affirm the District Court's determination that Kofoed's claim is preempted.

IV.

Under the doctrine of complete preemption, a state law claim that requires interpretation of a CBA is converted into a federal claim "from its inception." *Balcorta,* 208 F.3d at 1107. Therefore, Kofoed's slander claim *is* a federal claim

arising under the NLRA and on that basis must be dismissed. Kofoed's remaining arguments for reversal are therefore rejected.

For the foregoing reasons, we **AFFIRM** the District Court's finding of § 301 preemption and the resulting dismissal of Kofoed's suit.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON DATED NOVEMBER 2, 2004

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 04-00558-AA

JOSEPH W. KOFOED,

Plaintiff ,

v.

STEVEN SHIPRACK,

Defendant.

OPINION AND ORDER

AIKEN, J.

Defendant filed a motion for summary judgment asserting that plaintiff's claim for defamation is preempted as a matter of law by Section 301 of the National Labor Relations Act. That motion is granted.

STANDARDS

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56©). Substantive law on an issue determines the materiality of a fact. *T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Assoc.*, 809 F.2d 626, 630 (9 Cir.1987). Whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party determines the authenticity of a dispute. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The moving party has the burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings and identify facts which show a genuine issue for trial. *Id.* at 324.

Special rules of construction apply when evaluating summary judgment motions: (1) all reasonable doubts as to the existence of genuine issues of material fact should be resolved against the moving party; and (2) all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. *T.W. Electrical*, 809 F.2d at 630.

DISCUSSION

Plaintiff is a union affiliated electrician. During the relevant time period, Siemens Power Corporation (Siemens) was signatory to a collective bargaining agreement (CBA) with IBEW Local 48. During that time, Siemens contacted Local 48 and requested that electricians be dispatched to a

jobsite. Plaintiff was one of the electricians dispatched by Local 48 to Siemens. Defendant was (and continues to be) an employee of Local 48. Defendant served as the Business Representative for Local 48 with one of his job responsibilities being the administration of the CBA for various contractors, including Siemens.

Plaintiff alleges that prior to his arrival as a job applicant to the Siemens' jobsite, the defendant "slanderously defamed the plaintiff to the company hiring agent, Mark Nadolny." Complaint, p. 1. Plaintiff further alleges that as a result of the defamation, plaintiff was not hired for the Siemens' job. Defendant has asserted an affirmative defense of qualified privilege.

The defendant moves for summary judgment on plaintiff's claim arguing that plaintiff's state tort claim for defamation is preempted because resolution of the claim is "inextricably intertwined with consideration of the terms of the labor contract." Defendant's Memo in Support of Summary Judgment, p. 1, citing *Allis-Chalmers v. Lueck,* 471 U.S. 202, 213 (1985).

Section 301 of the Labor Management Relations Act states:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce, or between any such labor organizations, may be brought in any district court of the United States

> having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a).

The Supreme Court holds that Section 301 preempts state law claims that are based on CBAs. *Spreewell v. Golden State Warriors,* 231 F.3d 520, 529 (9 Cir.2000) (citing *Allis-Chalmers,* 471 U.S. 202, 210). A state law claim is preeempted only when its resolution requires an interpretation of the CBA. *Spreewell,* 231 F.3d at 529 (internal citation omitted).

Regarding a state law claim for defamation, "preemption also exists when 'the interpretation of the CBA is made necessary by an employer defense.'" *Kofoed v. Rosendin Electric,* 157 F.Supp.2d 1152, 1156 (D.Or.2001) (*quoting Spreewell,* 231 F.3d at 529). The defendant's Fourth Affirmative Defense states that defendant was subject to a qualified privilege when he spoke with a representative of Siemens. In Oregon a statement is conditionally privileged if: (1) it was made to protect the interests of defendants; (2) it was made to protect the interests of plaintiff's employer; or (3) it was on a subject of mutual concern to defendant and the person to whom the statement was made. *Wattenberg v. United Medical Laboratories,* 269 Or. 377, 380, 525 P.2d 113 (1974).

Defendant argues that this court would be required to construe various provisions of the CBA between Siemens and Local 48 in order to determine whether defendant's

statement was made to protect his own or his employer's interest; whether it was made to protect the interests of plaintiff's (potential) employer, Mark Wadolny (hiring agent for Siemens) or Siemens; or whether the statement concerned a subject of mutual concern. I agree and find that plaintiff's defamation claim is preempted on the basis that the CBA will need to be construed to determine if defendant had a qualified privilege to make the allegedly defamatory statement to the employer representative. Some of the provisions of the CBA that could be relevant to such a determination include: Article 5.01.01-Referral Procedure ("in the interest of maintaining an efficient system of production in the Industry [and] providing for an orderly procedure of referral of applicants for employment"); Article 5.03.01 ("[t]he employer shall have the right to reject any applicant for employment"); Article 2.10.01 ("[t]he Union understands the employer is responsible to perform the work required by the owner. The employer shall therefore have no restrictions, except those specifically provided for in the collective bargaining agreement in planning, directing and controlling the operation of all his work, in deciding the number and kind of employees to properly perform the work, in hiring and laying off employees"); and "Basic Principles-All parties to and covered by this Agreement have a common and sympathetic interest in the Electrical Industry. Therefore, a working system and harmonious relations are necessary to improve the relationship between all parties aforementioned and the Public. Progress in industry demands a mutuality of confidence between all parties to and covered by the Agreement. All benefit by continuous peace and by adjusting any differences by rational common sense methods."

Therefore, I find that plaintiff's defamation claim is preempted on the basis that the CBA will need to be construed to determine if the defendant had a qualified privilege to make the statement at issue. Plaintiff's claim is converted into a claim under Section 301 of the National Labor Relations Act.

CONCLUSION

Defendant's motion for summary judgment (doc. 21) is granted. Plaintiff's motion for remand to state court (doc. 33) is denied as moot. The parties' request for oral argument is denied as unnecessary. Finally, this case is dismissed and all pending motions are denied as moot.

IT IS SO ORDERED.

Dated this 2 day of November, 2004.

/s/ Ann Aiken
Ann Aiken
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED NOVEMBER 13, 2006

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 04-36121

D.C. No. CV-04-00558-ALA
District of Oregon,
Eugene

JOSEPH KOFOED,

Plaintiff - Appellant,

v.

STEVEN SHIPRACK,

Defendant - Appellee.

ORDER

Before FERGUSON and CALLAHAN, Circuit Judges, and BOLTON,* District Judge.

The petition for panel rehearing filed by plaintiff-appellant on September 12, 2006 is DENIED.

---

* The Honorable Susan R. Bolton, United States District Judge for the District of Arizona, sitting by designation.

APPENDIX D — COMPLAINT OF THE CIRCUIT COURT OF MULTNOMAH COUNTY, STATE OF OREGON DATED MARCH 17, 2004

THE CIRCUIT COURT OF MULTNOMAH COUNTY
STATE OF OREGON

Case No. 0403-2775

Joseph W. Kofoed

Plaintiff,

v.

Steven Shiprack

Defendant.

COMPLAINT
Defamation by Slander
JURY TRIAL DEMANDED

1. Previous to Plaintiff's arrival as a job applicant at a job site, 6:30 a.m. December 1, 1998 in Multnomah County Oregon, Defendant Steven Shiprack, an individual with unqualified privilege, slanderously defamed the Plaintiff to the company hiring agent, Mark Nadolny.

2. As a result of the defamation, Plaintiff was not hired. Through the Defendant's intentional interference and verbal misrepresentation, the Plaintiff was employment rejected.

Appendix D

3. Effects of the defamation directly attributed to employment status declassification, disability escalation, and exacerbation of an existing health condition, in conjunction with a high paying, long duration construction employment opportunity, plus futured reputation blighted.

WHEREFORE, Plaintiff prays for judgment in the sum of $250,000.

4. Direct Evidence will be provided for this Complaint and for the satisfaction of statute of limitations criteria met.

s/ Joseph W. Kofoed
Joseph W. Kofoed, Plaintiff Pro Per
Plaintiff demands trial by jury

Dated: March 17, 2004